IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1976

NO. 76-200

TEXAS EDUCATION AGENCY
(Austin Independent School District), et al,
Petitioner

V.

UNITED STATES OF AMERICA, et al,
Respondents
MEXICAN-AMERICAN LEGAL DEFENSE & EDUCATIONAL FUND, et al,
Intervenors-Respondents
DEDRA ESTELL OVERTON, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, et al,
Intervenors-Respondents

PETITIONER AUSTIN INDEPENDENT SCHOOL DISTRICT'S REPLY BRIEF

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER AUSTIN INDEPENDENT SCHOOL DISTRICT'S REPLY BRIEF

Petitioner, Austin Independent School District, pursuant to Rule 24, respectfully files this reply to the Brief

for the United States and the Brief for the Mexican-American Intervenors (MALDEF).

Petitioner welcomes the Government's decision not to oppose the granting of the Petition for Certiorari in this case. Petitioner further welcomes the Government's agreement (Br. 6-7) that, "if the language of the panel [of the Court of Appeals] is taken at face value," the panel has "abolished the distinction" between "*de jure* segregation" and "*de facto* segregation." The Government also agrees (Br. 7) that "the panel has neglected to make a crucially important distinction that is necessary to determine when discriminatory intent may be inferred from racially disproportionate effects" and (Br. 13) that the panel's opinion "appears to conflict with holdings of many other courts of appeals" and, if uncorrected, "may inject unnecessary uncertainty into school litigation in the Fifth Circuit." Surely, we submit, these aspects of the decision below are, of themselves, sufficient reasons to grant the petition for review.

Petitioner cannot agree, however, with the Government's assertion that the opinion below is not "necessarily" (Br. 5) read as constitutionally prohibiting the use of neighborhood assignment in areas of racial or ethnic residential concentration. As shown in the Petition (Pet. 10-16), the opinion cannot reasonably be read in any other way. The opinion explicitly states that "school authorities may not constitutionally use a neighborhood assignment policy creating segregated schools in a district with ethnically segregated residential patterns." (Pet. App. 20) This is not, as the Government (Br. 4-5) and MALDEF (MALDEF Br. 12) would suggest, a casual or isolated statement, but is the essential foundation of the Court's decision, repeated in various forms throughout

the entire opinion. For example, the Court of Appeals considered it a "basic misconception" that not all school racial or ethnic concentration is constitutionally prohibited. (Pet. App. 19) Further, the Court's opinion offers no valid other basis for its reversal of the District Court's decision. As already noted, the Government, with some apparent inconsistency, agrees in the end that the Court of Appeals "neglected to make a crucially important distinction" (Br. 13) in its finding of unconstitutional segregation of Mexican-American students.

Petitioner further disagrees with the Government's attempt to find support for the Court's decision in a footnote reference by the Court to an earlier opinion in *Austin I*. The reference is to a minority opinion and in any event that opinion — expressly rejecting discriminatory intent "as a prerequisite to establishing an equal protection violation" — itself applied an erroneous legal standard in finding unconstitutional segregation of Mexican-American students. The Government's statement that "all 14 judges" who participated in *Austin I* "concluded that the AISD had discriminated against blacks and Mexican-Americans" is plainly in error; six judges did so conclude, using an erroneous standard, but the remaining eight judges refused to join the opinion of these six judges. The majority agreed, of course, as the Government notes (Br. 10) that "the dual school system and all discriminatory segregation against Mexican-American and black students [must] be eliminated 'at once.'" The majority was clearly of the opinion, however, that, as to Mexican-Americans, the existence of a dual system had not been shown, and remanded the case for the taking of additional evidence on that issue, specifically instructing the District Court that its power to

require a remedy "will depend first upon a finding of the proscribed discrimination in the school system." 467 F.2d at 884. Further hearings were then held, and the District Court found no unconstitutional segregation of Mexican-Americans. By relying on the present panel's footnote reference to a minority opinion in *Austin I*, the Government (and MALDEF) is in effect arguing that the District Court's fact findings were held clearly erroneous before they were made.

Apparently doubting the persuasiveness of its "interpretation" of the Court of Appeals' opinion, the Government further argues (Br. 10), in the alternative, that "the evidence is sufficient to support the finding of discrimination [against Mexican-Americans], and that this alternative ground is sufficient to support the judgment of the court of appeals, whether or not the court relied upon it." The Government asserts this though it recognizes (Br. 10-11) "that some of the evidence concerning discrimination is old, that some of the effects of the discrimination may long since have dissipated, and the district court concluded that Petitioners did not act with discriminatory intent." (Br. 10-11) This brief is not the place to enter into a discussion of the evidentiary determinations involved in the issue of discriminatory intent, but the fact is that every alleged instance of discrimination against Mexican-Americans was refuted by the School District and was twice found by the District Court to be unproved. The Court of Appeals has neither stated nor shown that the District Court's findings are clearly erroneous. In these circumstances, the Government's suggestion that this Court should affirm the decision of the Court of Appeals, although rejecting the basis for that decision, is clearly unsupportable.

MALDEF (MALDEF Br. 6) apparently agrees with Petitioner and the Government that holding "the neighborhood school unconstitutional" *per se* where racial imbalance results cannot be supported. Unlike Petitioner and the Government, however, MALDEF finds (MALDEF Br. 6) that "nothing could be further from the truth" than that this is what the Court of Appeals in fact held. MALDEF's extensive, argumentative and one-sided (and inaccurate) discussion of the evidence[1] (Br. 8-12) serves only to reinforce Petitioner's contention that the findings of the District Court on that question cannot properly be found clearly erroneous by this Court.

Although initially insisting that the Court of Appeals' opinion cannot be read as in effect eliminating discriminatory intent as an element of *de jure* segregation, MALDEF later virtually concedes (MALDEF Br. 13) that it can be so read. Again unlike the Petitioner and the Government, however, MALDEF sees no need for this Court to correct this crucial error, because, it believes, "this Court has recently laid to rest any confu-

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[1]On page 3 of their brief, the MALDEF Intervenors make the statement that the only testimony in support of such exclusion [extensive transportation to additionally desegregate kindergarten through fifth grade students] was a naked assertion by the Superintendent and that he considered busing at such an age to be educationally unproductive. Such a statement ignores the extensive evidence contained in the 1973 hearing and the even further extensive evidence, specifically relied upon by the District Court, from educational experts in the original hearing. In addition, on page 2, the MALDEF Intervenors incorrectly state that the 1976 opinion by the Court of Appeals incorporates the factual findings of the first opinion. Nowhere can this be found in the Court of Appeals' opinion.

sion which may have previously existed concerning the necessity to prove intent in a desegregation case." (MALDEF Br. 13) The issue, as pointed out in the Petition, is that under the Court of Appeals' opinion, intent is actually irrelevant because the necessary "intent" always can be inferred from racial or ethnic imbalance alone. Such a holding is indeed contrary not only to this Court's decisions in *Washington v. Davis*, __ U.S. __, 996 S.Ct. 1040 (1976), and *Pasadena City Board of Education v. Spangler*, __ U.S. __, 96 S.Ct. 2697 (1976), the decisions cited by MALDEF, but is also contrary to this Court's opinion in *Keyes v. School District No. 1*, 413 U.S. 189 (1973). This fact, however, has not prevented the Court of Appeals from applying an erroneous standard in the present case, and there is little reason to believe it will prevent that Court and other courts from applying that erroneous standard in future cases, unless the error is specifically corrected by this Court in the context of a direct holding that unconstitutional segregation cannot be based on the use of racially neutral neighborhood schools in areas of racial or ethnic concentrations.

The Government's further suggestion that the Court could summarily clarify the governing legal standards and remand is distressing. The only way to clarify for all courts the correct legal standards in school desegregation cases is for this Court to announce and to apply these standards to a particular fact situation. Petitioner submits that this Court should not summarily affirm, for affirmance would require disregarding findings of fact that have never been held by any court to be clearly erroneous and would affirm a decision that is directly

contrary to this Court's recent holdings in *Washington, supra,* and *Pasadena, supra*.

Petitioner respectfully submits that the Petition for Certiorari herein should be granted and that the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William H. Bingham, a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing Brief on counsel for Respondents by depositing same in the United States Mail on October _____, 1976, addressed to the Solicitor General, Department of Justice, Washington, D.C., 20530, Joe Rich, Department of Justice, Civil Rights Division, 550 11th Street, N.W., Washington, D.C., 20530, Sam Bisco, 1704 Manor Road, Austin, Texas, 78722, Gabriel Gutierrez, 1010 E. 7th Street, Austin, Texas, 78701.